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In the

Supreme Court of the United States

JESSICA HANKEY, ADMINISTRATRIX FOR THE ESTATE OF RYAN ROHRBAUGH,
Petitioner,

v.

WEXFORD HEALTH SERVICES, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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September 1, 2010

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QUESTION PRESENTED

Whether a prison official is liable to an inmate under 42 U.S.C. § 1983 for being deliberately indifferent to an inmate's serious medical need according to this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976) when that official conceded that he knew the inmate had fast spreading and potentially deadly malignant melanoma and still chose to discontinue treatment for that inmate which later resulted in the inmate's death due to his disease.

Whether the Third Circuit Court of Appeals erred when it affirmed the district court's grant of summary judgment when genuine issues of material fact still remained.

LIST OF PARTIES

In addition to the party listed in the caption, Alan Esper, D.O., Prison Health Services, Inc., and Mark Baker, D.O. are also respondents.

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Petitioner Jessica Hankey, Administratrix of the Estate of Ryan Rohrbaugh, respectfully asks that this Court review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the Third Circuit Court of Appeals is not officially reported but is available at 2010 WL 2222923. It is reproduced in the Appendix herein at 1a-14a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was issued on June 4, 2010. Pet. App. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Title 42 of the Public Health Service Act, as amended, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

As an inmate at Pennsylvania's State Correctional Institution – Albion, Ryan Rohrbaugh knew that he had a large and fast-growing lesion on his back. On September 27, 2003, he underwent a shave biopsy of the lesion. A pathology report was generated from that biopsy. It revealed that Ryan had malignant melanoma with a Clark's level of at least IV. The maximum Breslow thickness was at least 5mm.

Dr. Mark Baker, the medical director of State Correctional Institution – Albion, received this report on October 7, 2003. As medical director, Dr. Baker's responsibilities included consulting the appropriate specialist so that the specialist could make recommendations and formulate a treatment plan for Ryan. (Baker deposition, page 18, lines 18-20).

Rather than have Ryan see an oncologist or a melanoma specialist, Dr. Baker referred him to a general surgeon. Dr. Esper, that general surgeon, wrote a letter dated October 15, 2003, outlining Ryan's

family history of skin cancer, his biopsy-proven malignant melanoma, and the 2 cm diameter of the cancerous lesion. (October 15, 2003 letter). Dr. Esper also recommended that Ryan needed a wide excision. (October 2003 letter). Dr. Baker, being the only person who could write orders for Ryan's treatment, ordered the wide excision.

On November 4, 2003, Dr. Esper performed the wide excision. (November 4, 2003 Operative Report). The lesion removed was sent to pathology for analysis. The resulting report was generated on November 6, 2003 and revealed that Ryan had "superficial spreading malignant melanoma, Clark's Level V, 6mm thick with mild Lymphohistiocytic inflammatory infiltrate." (November 6, 2003 Pathology Report). Dr. Baker received this report on November 7, 2003.

Dr. Esper testified that he believed Ryan required an urgent oncological consult at that time. (Esper deposition, page 47, lines 17-20). Furthermore, he made this recommendation to Dr. Baker. (Esper deposition, page 47, lines 21-25).

At that time, Dr. Baker had been in practice for sixteen years. He testified that he had been to numerous conferences where he was educated about malignant melanoma. (Baker deposition, page 9, lines 22-25). He knew that Ryan needed an oncological consult, and he understood that the consult had to be timely. (Baker deposition, page 42, lines 16-24).

Dr. Baker then met with Ryan on November 19, 2003. During their conversation, Ryan revealed that he was going to be released from prison soon and that he was planning to see a doctor. Based solely on that

information, Dr. Baker chose not to order an oncological consult. He did not discuss the implications of not getting an oncological consult with Ryan. He did not explain what level of cancer Ryan had or inform Ryan that the cancer could have spread. (Baker deposition pages 57-58). Ryan did not sign a DC-462, a form that medical providers have inmates sign to document their refusal of medical treatment. He did not sign this form because he did not refuse the oncological consult. Rather, Dr. Baker affirmatively made the decision not to order one for Ryan.

During that meeting, Dr. Baker knew that metastasis of Ryan's cancer was not ruled out. (Baker deposition, page 46, line 23). Other than the wide excision, no other tests were done to rule out metastasis. (Baker deposition, page 47, line 1). According to Dr. Baker, the goal in treating a patient in Ryan's situation is for "follow-up with an oncologist to develop a treatment plan for that, because we know malignant melanoma can be deadly." (Baker deposition, page 58, line 19-22).

Dr. Baker saw Ryan for the last time on December 5, 2003. The doctor did not know what Ryan's prognosis was as there was no oncology consult to indicate it. (Baker deposition, page 59, lines 19-21). He simply wrote an order for some medication and left it at that. (Baker deposition, page 60, lines 3-6).

Ryan was released from prison on December 22, 2003. He discovered that moles were once again forming on his back. When he went to the doctor in February 2004, he discovered that his malignant melanoma had reoccurred. (Rohrbaugh video deposition, page 64, line 11). For the next two and a

half years, he underwent multiple treatments for his melanoma. Ultimately, Ryan died of melanoma on June 7, 2006.

REASONS FOR GRANTING THE WRIT

I. THE THIRD CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT DR. BAKER'S STATE OF MIND DID NOT RISE TO THE LEVEL OF "OBDURACY AND WANTONNESS" NECESSARY FOR AN EIGHTH AMENDMENT CLAIM.

A. If a Prison Doctor Knows That an Inmate has a Rapid Spreading and Potentially Fatal Disease and Still Chooses to Discontinue Treatment, Then That Should Meet the Subjective Component of the Deliberate Indifference Standard.

Under the Eighth Amendment of the United States Constitution, inmates cannot be subject to cruel and unusual punishment. U.S. Const. Amend. 8. In order to establish a prima facie case of cruel and unusual punishment based on the denial of medical care, an inmate must establish that the prison official acted "with deliberate indifference to his or her serious medical needs." *Estelle v. Gamble*, 429 U.S. 97 (1976). This Court, in *Estelle*, has defined the phrase "deliberate indifference" to be an indifference that offends our standards of decency. Id. This deliberate indifference would then give rise to a cause of action under §1983.

This Court expounded on the definition of "deliberate indifference" in *Farmer v. Brennan*, 511

U.S. 825 (1994) by requiring that two factors be met. First, the consequences of the prison official's act must be "sufficiently serious." Id. at 834. There is no dispute that Ryan's malignant melanoma was serious. As a result of the spread of his melanoma, Ryan passed away in 2006.

Second, the prison official must "have a sufficiently culpable state of mind." Id. The state of mind issue is the subjective component that is disputed in this case.

In *Farmer*, this court ultimately adopted the rule that for an Eighth Amendment violation, the prison official must have known about the facts that produces the serious risk of harm to the inmate, but still ignores that risk. Id. at 837. This is the same standard of subjective recklessness that is used in criminal law. Id. at 837-840.

By applying the *Farmer* standard to this case, the issue raised is whether the Eighth Amendment is violated when a prison doctor knows that an inmate has a potentially deadly and fast spreading cancer but still chooses to discontinue treatment of that cancer. Using language from *Whitley v. Albers*, 475 U.S. 312, 319 (1986), the Third Circuit found that Dr. Baker's state of mind did not rise to the level of "obduracy and wantonness" necessary for an Eighth Amendment claim.

The court below focused on the amount of treatment Ryan received before his release from prison to determine that the subjective component of the deliberate indifference standard was not met. It noted that in the span of four months, Ryan received a referral to a general surgeon, a shave biopsy, an

excisional biopsy, and a follow-up by Dr. Baker. The Third Circuit erred in applying these facts to the *Farmer* standard because during these treatments, Dr. Baker did not fully understand how serious Ryan's cancer was.

The subjective component of the deliberate indifference standard should be analyzed based on Dr. Baker's actions after he received the November 6, 2003 pathology report because that is when he confirmed that Ryan had malignant melanoma with the strong possibility of metastasis. The serious risk of harm to Ryan was the chance that his melanoma had spread. The mole on his back had grown rapidly in the months that he had been incarcerated. Dr. Baker also knew that Ryan had a family history of skin cancer. Both these factors increased the chances that the melanoma had spread. Despite what he knew, Dr. Baker still chose to discontinue treatment, which satisfies the subjective component of the deliberate indifference standard.

B. The Third Circuit erred by holding that Ryan's claim amounts to a disagreement over whether he received the most appropriate care for his condition.

In *Estelle v. Gamble,* 429 U.S. 97, 98 (1976) the plaintiff claimed that he had not received appropriate medical treatment. He suffered a back injury while working for the prison, but still received treatment for every medical problem he had. Id. The basis for his suit was that more should have been done for him, including an x-ray. Id. This Court found that an order for an x-ray fell within the "classical example of a matter for medical judgment." Id. at 107. Having a

difference in medical judgment does not give rise to an § 1983 action. Id. Unlike the facts in *Estelle*, there is no difference in medical judgment here. Dr. Baker knew that an oncologist could determine whether Ryan's cancer had metastasized and therefore take proactive measures to combat it, but he decided to discontinue treatment and let Ryan take care of himself weeks later.

Dr. Baker testified in his deposition that he was in practice for sixteen years before treating Ryan. He had been to numerous conferences which concentrated on the diagnosis and treatment of cancer. He had taken note that Ryan had a family history of skin cancer, and he knew that the mole on Ryan's back had grown rapidly. After Dr. Esper cut out the mole, the chances that the cancer had already spread beyond the excision was high.

Dr. Esper had testified in his deposition that he would highly recommend Ryan receive an oncological consult because his prognosis was so poor. (Esper deposition, page 37, lines 18-20). Dr. Baker received notice of this recommendation through his physician's assistant.

Petitioner's Family Medicine Expert, Casey Cochran, D.O., issued a report opining that once Dr. Baker possessed the knowledge that Ryan's melanoma was at least 5mm thick, the standard of care applicable to Dr. Baker required immediate referral to a medical oncologist or a melanoma specialist. Pet. App. 6a. Dr. Cochran also opined that such a referral would be for the appropriate specialist to determine the additional testing that needed to be performed in order to learn whether the cancer had metastasized.

In addition, Plaintiff's Surgical Oncology Expert, Douglas Fraker, M.D., chief of surgical oncology at the University of Pennsylvania, opined that given the information available to Dr. Baker as of his November 19, 2003 evaluation of Ryan, the appropriate standard of care required an urgent re-excision with sentinel node biopsy and lymph node mapping. Pet. App. 6a.

The evidence shows that Dr. Baker was aware of such opinions and even agreed with them. By his own admission, he was aware that of metastasis of Ryan's cancer was not ruled out. With this knowledge in mind, Dr. Baker simply gave Ryan his pathology report for him to take home instead of continuing treatment. Dr. Baker's reasoning was that he thought Ryan would be getting out of prison in anywhere from two to eight weeks and would follow up with a physician then. In fact, Ryan got out of prison on December 22, 2003 and was not able to follow up with a physician for another seven weeks.

Dr. Baker discontinued treating Ryan's cancer knowing that Ryan had the worst stages of malignant melanoma that inevitably resulted in his death in 2006. This is the prime example of deliberate indifference and not a difference in medical opinion.

By affirming the district court's order, the court below erred in concluding that "a reasonable jury could not conclude, on the evidence presented, that Dr. Baker's state of mind rose to the level of obduracy and wantonness necessary for an Eighth Amendment claim." Such a holding is a misinterpretation of the "deliberate indifference" standard and strays from the principles established in *Estelle* and *Farmer* enough to warrant review and clarification by this Court.

II. THE THIRD CIRCUIT COURT OF APPEALS ERRED BY AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT.

A. The Third Circuit Disregarded Genuine Issues of Material Fact When Affirming the Grant of Summary Judgment.

Rule 56 of the Federal Rules of Civil Procedure dictates the procedure for summary judgment. This Court has held that upon a Motion for Summary Judgment pursuant to that rule, the burden is on the moving party to prove that no genuine issue of material fact exists while considering the evidence most favorable to the other party. *United States v. Deibold, Inc.*, 369 U.S. 654, 655 (1962). In *Celotex Corp. v. Catrett, Adm'x of the Estate of Catrett*, 477 U.S. 317, 322 (1986), this Court explained how the moving party should demonstrate that no issue of material fact exists. Id. at 323. Specifically, that party should "identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." Id.

By holding that Dr. Baker did not act with deliberate indifference, the lower courts decided a question of fact, thus encroaching upon the duties reserved for a jury.

Based upon the evidence and record presented to the district court and the Fourth Circuit, there was plenty of evidence to create a genuine issue of material fact as to whether or not Dr. Baker acted with

deliberate indifference toward Ryan's serious medical need. Such evidence includes:

1. Dr. Alan Esper's deposition testimony that Ryan needed an oncological consult, that Dr. Baker was the only person who could order one, and that Dr. Baker knew of Dr. Esper's recommendation.

2. Dr. Baker knew that there was high probability that Ryan's cancer had metastasized but did not clearly explain to Ryan what that meant or the need for an oncological consult before discontinuing treatment at the prison.

3. Casey Cochran, D.O., Petitioner's expert, opined that once Dr. Baker possessed the knowledge that Ryan's melanoma was at least 5mm thick, the standard of care applicable to Dr. Baker required an immediate referral to a medical oncologist or a melanoma specialist.

4. Dr. Cochran also opined that Ryan could have been a candidate for other treatments in addition to surgery such as adjuvant therapy that could have saved his life.

5. Ryan Rohrbaugh's video deposition testimony stating that he trusted Dr. Baker's statement that "we got it all".

As the trier of fact, it is the jury's job to determine whether a doctor's inadequacies rise to the level of deliberate indifference. For the lower courts to grant summary judgment based on these facts is an error. The jury should be given the opportunity to decide

whether Dr. Baker's treatment of Ryan's cancer constituted deliberate indifference.

This Court should grant review to this case in order to further clarify the standard for summary judgment.

B. The Third Circuit Misstated the Facts by Finding that Ryan Agreed to Discontinue His Treatment.

As part of the reason for discontinuing Ryan's treatment, Dr. Baker cited that Ryan was willing to wait until he was released from prison before following up on his cancer. Ryan did not protest when an oncologist was not consulted after the wide excision of his mole, but that was because he believed that the doctors had gotten "all of it."

Ryan Rohrbaugh's highest level of education was his GED, and he did not have any formal training in medicine. Ryan did not have any kind of understanding of cancer or melanoma. (Rohrbaugh deposition, page 123, lines 4-10). Therefore, when Dr. Baker told him that they cut out the cancerous mole, Ryan thought that he would be fine. Ryan remembers that Dr. Baker had told him, "We got it all". Dr. Baker failed to explain to him the possibility that the cancer had metastasized, had spread to his other organs, which in fact, it did. As a doctor with sixteen years of experience and more than a working knowledge of cancer, Dr. Baker was well aware what the implications of Ryan's pathology report was, and he still discontinued treatment.

Ryan waited until after he was released from prison to see an oncologist because he thought that the

cancer was gone. Had Dr. Baker revealed the possibility of metastasis, Ryan most likely would have asked for the oncological consult.

During that conversation, Ryan did not expressly refuse an oncological consult. (Baker deposition pages 57-59). Dr. Baker did not explain to him what Clark's level V meant. He only indicated that Ryan needed to follow-up with his physician when he returned home. He gave Ryan his medical papers for that purpose, but in terms of treatment, he decided to discontinue treatment for the cancer and only prescribed some medication for Ryan's back.

In addition to educating Ryan about the implications of his cancer, Dr. Baker should have let Ryan make the decision to not see the oncologist for himself. He should have had Ryan sign a DC-462, the Release from Responsibility for Medical Treatment form. (Baker deposition, page 44, lines 20-23). Dr. Baker did not even attempt to have Ryan sign this document, proving that he made the decision to discontinue Ryan's treatment for his cancer on his own.

Based on the reasons above, Petitioner has offered sufficient evidence from which a reasonable jury could infer that Dr. Baker acted with deliberate indifference toward Ryan Rohrbaugh's condition by discontinuing treatment of his cancer that allowed his cancer to metastasize and later lead to his death. The Third Circuit Court of Appeals therefore erred by affirming the district court's grant of summary judgment.

CONCLUSION

For all the foregoing reasons, petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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